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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 10 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a technical specialist – electronic controls. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, counsel, relying on standards never enacted as legal authority, has not overcome the director's denial. It remains that the petitioner has not submitted any evidence of his influence on the field, such as, but not limited to, letters from outside his immediate circle of current and former colleagues, evidence of widely or even moderately cited articles or even patents/patent applications listing the petitioner as an inventor. The letters submitted provide mostly poorly supported broad assertions. Without such evidence, the petitioner cannot demonstrate the type of record of success and influence that could support a request for a waiver of the alien employment certification in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Mechanical Engineering from the Massachusetts Institute of Technology (MIT). The petitioner's occupation falls within the pertinent regulatory definition of a

profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

During this proceeding, counsel has also referenced the petitioner's purported exceptional ability. As the petitioner qualifies as a member of the professions holding an advanced degree, the issue of whether he also qualifies for classification as an alien of exceptional ability is moot. We note that the exceptional ability classification, like the advanced degree professional classification, normally requires an alien employment certification. Thus, even if the petitioner had demonstrated the degree of expertise significantly above that ordinarily encountered in the field required for aliens of exceptional ability, that expertise alone would not warrant a waiver of alien employment certification in the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 222 (Comm. 1998)[hereinafter "*NYSDOT*"].

The issue before us is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . .." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*NYSDOT*, 22 I&N Dec. at 217-218, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

On appeal, counsel asserts that the director applied the wrong standard and then asserts that the petitioner meets the standards for a national interest waiver set forth in a *proposed* rule published at 60 Fed. Reg. 29771, 29777 (proposed 1995). As this rule was never finalized, it has no legal authority. Rather, in 1998, this office issued the precedent decision cited above relating to national interest waivers.

The regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act; however, unpublished decisions are not similarly binding. Thus, *NYSDOT,* 22 I&N Dec. at 215, supercedes any previous decisions by this office, especially decisions that were never designated as precedents. Moreover, non-precedent decisions issued after *NYSDOT,* 22 I&N Dec. at 215, cannot alter the standard set forth in that decision.

While counsel does not discuss *NYSDOT,* 22 I&N Dec. at 215, on appeal, counsel does acknowledge this decision in his initial cover letter. Counsel, however, asserts that *NYSDOT,* 22 I&N Dec. at 215, "is simply inapplicable to [the petitioner's] request for a national interest waiver and thus should not impede (or have any bearing on) the adjudication of this petition." Counsel's first basis of rejecting the standards set forth in that decision is that the decision sets forth criteria that are *ultra vires.* To date, however, neither Congress[1] nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. In fact, one federal court has rejected the argument that the precedent decision violates the Administrative Procedure Act, stating:

> Plaintiff also argues that the adoption of *NY[S]DOT* as a precedent decision is a violation of the APA's notice and comment requirement. *See* 5 U.S.C. § 553(b) & (c). However, notice and comment proceedings are not required when an agency adopts an interpretive rule. *See* 5 U.S.C. § 553(b)(A). *NY[S]DOT* is clearly interpretive because it does not create new rights or duties, but rather "provides a reasonable and predictable interpretation" of the statute. *See Mejia-Ruiz v. INS,* 51 F.3d 358, 364 (2d Cir.1995). Thus, Plaintiff's claim of a violation of the APA's notice and comment requirement fails as well.

*Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001).

Counsel's second basis of rejecting *NYSDOT,* 22 I&N Dec. at 215, as a proper authority is that "the evidence herein clearly demonstrates that all three elements required by [NYSDOT] are present here." Counsel provides no explanation for how the petitioner's alleged ability to meet the standard set forth in a precedent decision renders that standard inapplicable. We note that *NYSDOT,* like the case before

[1] Congress did subsequently amend the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *NYSDOT*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

us, involved an engineer. Thus, the proper standard in this matter is that set forth in *NYSDOT,* 22 I&N Dec. at 215.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *NYSDOT*, 22 I&N Dec. at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The director did not contest that the petitioner works in an area of intrinsic merit, engineering. The director then concluded that the proposed benefits of his work, the development of clean, efficient and versatile diesel engines, would not be national in scope. As the benefits of the technology on which the petitioner is working would not be limited regionally, we withdraw the director's finding on this issue.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. On appeal, counsel asserts that the director erred by focusing on the petitioner's record of professional achievements rather than the significance of the projects on which the petitioner works. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218, 220. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner relies on several reference letters. The director dismissed these letters based on similar language contained in more than one letter and the failure of references who appeared to be independent to explain how they knew of the petitioner's work. On appeal, the petitioner submits a new letter from one reference affirming his authorship of his prior letter and asserting that some of the language derived from the petitioner's article.

All of the reference letters are signed and the director cites no reason to doubt the authenticity of the signatures. Thus, the references have all affirmed the information in the letters. That said, the use of boilerplate language suggests that the language is not that of the author. While the use of boilerplate language does not necessarily reduce the credibility of the signatures, it can, on a case-by-case basis, diminish the evidentiary value of the letters.

Ultimately, Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions that the alien is talented or has garnered "international attention" or "mass recognition" in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

While the director concluded that some of the petitioner's references were independent and questioned their knowledge of internal reports, a review of the curriculum vitae of these references reveals that all of the references supporting the petition are the petitioner's former colleagues or former fellow students. Thus, the petition is not supported by a single independent expert in the field. While letters from the petitioner's immediate circle of colleagues are important and establish his role on various projects, such letters cannot, by themselves, establish the petitioner's influence on the field as a whole beyond those colleagues. Within this context, we will evaluate the letters and the remaining evidence.

The petitioner obtained his Ph.D. from MIT in 1999. The petitioner submits his unpublished thesis and the record is absent evidence that he published his Ph.D. research or presented the results of this research at a scientific conference. He then went to work for Cummins, Inc. where he was employed as of the date of filing. At Cummins, the petitioner authored internal reports and presented his work at the 2005 Society for Automotive Engineers (SAE) World Congress, which was reproduced in their proceedings.

[redacted] Director of Decision and Security Technologies at BBN Technologies in Cambridge, Massachusetts and formerly a Ph.D. student and postdoctoral fellow at MIT, asserts that the petitioner worked on the development of non-invasive vibration-based diagnostic systems for reciprocating machinery at MIT, which "garnered him international attention." While [redacted] asserts that this work can be used by engine manufacturers for misfire diagnostics and for research towards meeting new emissions standards, [redacted] does not explain how this work had already influenced the field.

Similarly, [redacted], an associate professor at the Université de Sherbrooke in Quebec and the petitioner's former fellow student at MIT, asserts that the petitioner gained "international attention" for his work on aircraft engines at MIT. This work formed the basis of the petitioner's Ph.D. dissertation. Neither [redacted] nor [redacted] explains how the petitioner's unpublished Ph.D. research garnered any attention beyond MIT, let alone internationally as claimed.

The fact that the petitioner's work was funded by the Naval Civil Engineering Laboratory (NCEL) and the National Aeronautics and Space Agency (NASA), as noted by [redacted] and [redacted] is not determinative. Most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] a technical advisor for Cummins, asserts that the petitioner "is responsible for real-time control of diesel engines and associated emission controls after-treatment technologies for reducing carbon monoxide, hydrocarbons, oxides of nitrogen and particulate matter, four of the most significant pollutants." Specifically, the petitioner has "singularly developed models capable of controlling actual systems in engine test cells and vehicles." [redacted] provides no examples of how these models have influenced the field of mechanical engineering or even how they improve upon previous models aimed at reducing pollutants.

[redacted] further asserts that the petitioner has authored "numerous in-house technical reports" at Cummins. [redacted] asserts that the petitioner's publication record and contributions "have garnered him an international reputation within the field of mechanical engineering." [redacted] does not explain how the petitioner's publication record, consisting of internal reports and one conference presentation, has resulted in the petitioner's international recognition. For example, [redacted] does not assert, and the record does not document that researchers worldwide have cited the petitioner's presentation, published in conference proceedings. Moreover, as stated above, the record does not contain a single letter from a member of the petitioner's field who is not a current or former colleague or fellow student of the petitioner.

[redacted], Director of Transportation Programs at Pacific Northwest National Laboratory and a former employee of Cummins for 16 years, asserts that the petitioner was "absolutely critical" to a cross-functional team that delivered optimized system solutions and supported the migration of these

systems to the product development teams. [redacted] asserts that the petitioner's contributions to the field are evident from the numerous internal reports he has been asked to draft for [redacted] Authoring successive internal reports may be indicative of the petitioner's satisfactory performance for his employer, but we are not persuaded that they necessarily are presumptive evidence of a contribution to the field as a whole.

[redacted] further asserts that the petitioner served as a peer-reviewer "for an international acclaimed journal within the field of mechanical engineering." He does not identify the journal. [redacted] asserts that the petitioner was invited to serve as a peer reviewer for *Diesel Exhaust Emission Control Modeling*. More specifically, [redacted] Controls Lead at Feetguard Emissions Solutions, a subsidiary of Cummins asserts that the petitioner reviewed manuscripts for the Diesel Exhaust Emission Control Modeling session of the 2005 SAE World Congress. The record, however, lacks primary evidence of these duties such as the actual requests or confirmation from a journal or SAE International itself. Regardless, the petitioner has not established that participation in the peer review process, a process that requires the commitment of a large number of science professionals to review all of the manuscripts submitted to every peer-reviewed journal and conference, is indicative of the petitioner's influence in the field.

[redacted], a technical lead at General Motors and former employee at Cummins where he coauthored a report with the petitioner, provides more detail. Specifically, the petitioner developed different control algorithms capable of monitoring the Lean NOx Trap aftertreatment systems and determining when to regenerate the catalyst, allowing this project to progress and demonstrating the feasibility of meeting government standards for light duty vehicles after 2007.

[redacted] provides additional specifics as follows:

> [The petitioner] has successfully enhanced controller design, based on engine test cell results and customer inputs. He has designed, developed and implemented diagnostic and prognostic strategies for individual components as well as for the total system, including On-Board Diagnostics. [The petitioner] has contributed to many after-treatment technologies including urea-SCR for reducing oxides of nitrogen emissions, and Diesel Particulate Filter for reducing particulate matter emissions.

The letters provided in response to the director's request for additional evidence provide more technical detail but fail to explain how the petitioner's work has already influenced the field. As with the initial letters, the new letters are all from colleagues or former colleagues: Cummins employees, former Cummins employees and an employee of a Cummins subsidiary. Despite the director's request for any patents or patent applications that list the petitioner as an inventor, the response did not include such documentation.

On appeal, the petitioner submits a June 26, 2003 letter from [redacted] to the SRC Secretary at Cummins. [redacted] does not provide his title and the letter is not on any company letterhead.

Thus, his position and employer are unknown. [redacted] states that he received a disclosure from the petitioner and provides all of the technical information for the innovation. The letter then concludes that the disclosure is part of the Potomac Program and "is prime path for 2007 emissions control. Disclosure outside Cummins will likely begin to occur 4th quarter 2003." The record, however, does not contain any patents or patent applications listing the petitioner as an inventor.

Finally, the petitioner submits an article posted on the Diesel Technology Forum website. The undated article reports that representatives from several diesel engine manufacturers displayed their cleaner engines for the U.S. Environmental Protection Agency. Cummins was one of the manufacturers. The article does not single out the Cummins engine as more remarkable than the other cleaner diesel engines and does not mention the petitioner by name.

It is inherent to the field of engineering to improve existing technology. The record, however, contains little in the way of specific evidence to show what major improvements the petitioner has wrought in his field of endeavor. For example, the record contains no letters from anyone not currently or previously associated with institutions where the petitioner studied or works. The record contains no evidence that the petitioner has authored a remarkable number of articles, let alone widely cited articles. The record contains no patents or patent applications listing the petitioner as an inventor. The petitioner has authored internal reports and contributed to his employer's research and development program. Engineering, however, like most science, is research-driven, and there would be little point in pursuing research and development that did not add to the general pool of knowledge in the field or improve the efficiency of existing technology. Even if the petitioner had submitted patents or patent applications listing him as an inventor, it is not clear that everyone who holds a patent for a useful invention inherently qualifies for a national interest waiver of the job offer requirement. *NYSDOT,* 22 I&N Dec. at 221, n.7.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.